IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 851

SIDNEY J. GEFEN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petition for Rehearing

Petitioner presents his petition for a rehearing of this Court's order dated March 3, 1969, denying the petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit, and, in support thereof, respectfully shows:

GROUNDS FOR REHEARING

1. The decisions of the court below in the instant case and in *Damsky v. Zavatt*, 289 F.2d 46, upon the authority of which the instant case was decided, are directly in conflict with the decisions of this court in *Lipke v. Lederer*, 259 U.S. 557, 42 S.Ct. 549, 66 L.Ed. 1061 (1921), *Regal Drug Corp. v. Wardell*, 260 U.S. 386, 43 S.Ct. 152, 67 L.Ed. 318 (1922) and *Speiser v. Randall*, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed. 2d 1460 (1958). Moreover, the decision below probably conflicts with *United States v. Rindskopf*, 105 U.S. 418, 26 L.Ed. 1131 (1881) and *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed. 2d 644 (1963).

Neither of the opinions of the courts below referred to those opinions.

To illustrate the direct conflict it is necessary to set forth pertinent portions of the record below.

The government's complaint against the taxpayer set forth:

"III.

This Court has jurisdiction of this action under Title 28, United States Code, Sections 1340 and 1345, and under Sections 7402 and 7403, Internal Revenue Code of 1954.

VIII.

On August 23, 1956, the District Director of Internal Revenue, a delegate of the Secretary of the Treasury of the United States, made a 100% penalty assessment under Sections 6671 and 6672, Internal Revenue Code of 1954, arising out of the withholding and Federal Insurance Corporation Act tax liabilities of the Georgia Shipbuilding Corporation, St. Marys, Georgia,

in the amount of $47,991.17 for the taxable quarters ended September 30, 1954, December 31, 1954, March 31, 1955, and June 30, 1955. Although the District Director of Internal Revenue gave the defendant, Sidney J. Gefen, notice of this assessment and made a demand for its payment on August 23, 1956, the defendant has refused and continues to refuse to pay the balance outstanding on this assessment, and this balance in the amount of $40,273.25, plus statutory interest thereon is still due and owing to the United States by Sidney J. Gefen." (R. 8, 9)

At the commencement of the trial, the court ruled:

"The Court:

I think the defendant has the burden of proof. That will be the ruling of the Court." (R. 72)

The provisions of the United States Code contained in said allegations and otherwise applicable are:

§ 1395. Fine, penalty or forfeiture

(a) A civil proceeding for the recovery of a pecuniary fine, penalty or forfeiture may be prosecuted in the district where it accrues or the defendant is found. June 25, 1948, c. 646, 62 Stat. 936. (28 U.S.C. § 1395, 28 U.S.C.A. § 1395)

§ 6671. Rules for application of assessable penalties

(a) *Penalty assessed as tax.*—The penalties and liabilities provided by this subchapter shall be paid upon notice and demand by the Secretary or his delegate, and shall be assessed and collected in the same manner as taxes. Except as otherwise provided, any reference in this title to "tax" imposed by this title shall

be deemed also to refer to the penalties and liabilities provided by this subchapter.

(b) *Person defined.*—The term "person", as used in this subchapter, includes an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs. Aug. 16, 1954, c. 736, 68A Stat. 828. (26 U.S.C. § 6671, 26 U.S.C.A. § 6671)

§ 6672. Failure to collect and pay over tax, or attempt to evade or defeat tax

Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No penalty shall be imposed under section 6653 for any offense to which this section is applicable. Aug. 16, 1954, c. 736, 68A Stat. 828. (26 U.S.C. § 6672, 26 U.S.C.A. § 6672)

§ 7202. Willful failure to collect or pay over tax

Any person required under this title to collect, account for, and pay over any tax imposed by this title who willfully fails to collect or truthfully account for and pay over such tax shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution. Aug. 16, 1954,

c. 736, 68A Stat. 851. (26 U.S.C. § 7202, 26 U.S.C.A. § 7202)

§ 7401. Authorization

No civil action for the collection or recovery of taxes, or of any fine, penalty, or forfeiture, shall be commenced unless the Secretary or his delegate authorizes or sanctions the proceedings and the Attorney General or his delegate directs that the action be commenced. Aug. 16, 1954, c. 736, 68A Stat. 873. (26 U.S.C. § 7401, 26 U.S.C.A. § 7401)

Mr. Justice McReynolds delivering the opinion of the Court in *Lipke* stated:

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* * * * * * *

The mere use of the word "tax" in an act primarily designed to define and suppress crime is not enough to show that, within the true intendment of the term, a tax was laid. Child Labor Tax Case (May 15, 1922) [259 U. S. 20, ante, 817, 21 A.L.R. 1432, 42 Sup. Ct. Rep. 449]. When by its very nature the imposition is a penalty, it must be so regarded. Helwig v. United States, 188 U. S. 605, 613, 47 L. ed. 614, 617, 23 Sup. Ct. Rep. 427. *Evidence of crime (§ 29) is essential to assessment under § 35.* It lacks all the ordinary characteristics of a tax, whose primary function "is to provide for the support of the government," and clearly involves the idea of punishment for infraction of the law,—the definite function of a penalty. O'Sullivan v. Felix, 233 U. S. 318, 324, 58 L. ed. 980, 982, 34 Sup. Ct. Rep. 596. * * *

And certainly we cannot conclude, in the absence of language admitting of no other construction, that Congress intended that penalties for crime should be en-

> forced through the secret findings and summary action of executive officers. *The guaranties of due process of law and trial by jury are not to be forgotten or disregarded.* * * * " (Emphasis supplied)

In *Speiser* the Court stated:

> " * * * But while the fairness of placing the burden of proof on the taxpayer in most circumstances is recognized, this Court has not hesitated to declare a summary tax-collection procedure a violation of due process when the purported tax was shown to be in reality a penalty for a crime. Lipke v. Lederer, 259 U.S. 557, 42 S.Ct. 549, 66 L.Ed. 1061; cf. Helwig v. United States, 188 U.S. 605, 23 S.Ct. 427, 47 L.Ed. 614. The underlying rationale of these cases is that where a person is to suffer a penalty for a crime he is entitled to greater procedural safeguards than when only the amount of his tax liability is in issue. Similarly it does not follow that because only a tax liability is here involved, the ordinary tax assessment procedures are adequate * * * "

In their application of the foregoing provisions of the code the courts below reached a result which should be unacceptable to this Court. Clearly, petitioner's Fifth and Sixth Amendment rights are violated in several respects. There can be little question that Congress intended the imposition of a severe penalty upon the adoption of § 6672. Both the House Report and the Senate Report, in identical language, state:

> " * * * a penalty equal to the total amount of the tax evaded * * *. However, the application of this penalty is limited only to the collected or withheld taxes which are imposed on some person other

> than the person who is required to collect, account for and pay over the tax." 1954 U. S. Code Cong. and Adm. News, pp. 4568, 5245.

As to the relationship of that section to § 7202, the House Report further says:

> " * * * This provision corresponds to numerous sections of existing law which cover this offense." 1954 U. S. Code Cong. and Adm. News, p. 4572.

Thus, the same criteria, i.e., willfulness, failure to collect and pay over, etc., are elements of both offenses; one leading to the imposition of a civil penalty and the other imprisonment or fine or both fine and imprisonment. *Evidence of crime (§ 7202) is essential to assessment under § 6672.* It should also be noted that the fine under § 7202 applied in the case below is approximately 20% of the penalty actually levied on petitioner. However, petitioner was clearly prosecuted for a penalty (28 U.S.C. § 1395; 26 U.S.C. §§ 6671, 6672, 7401).

Since the taxpayer is required to make payment of the penalty out of his private property, as opposed to funds which he has collected from others or belong to the government, it constitutes a taking of his property, therefore due process is required.

It is as much a denial of due process to deny a defendant a jury under § 6672 as it would be under § 7202, as the standards of incrimination are the same and the penalty under § 6672 in this particular case is far greater.

2. The "due process" question is of great importance in the administration of the tax laws. Not only is every person who is a "responsible officer" affected, but this matter reaches even the housewife who is required to collect from her domestic servant.

3. Should the Justice Department commence prosecution (under § 7202) after an adjudication (as below) of the fact of willfulness (under § 6672) against a taxpayer, that taxpayer would in such case, be estopped to deny the essential facts by *res judicata.*

4. Due process of law has for centuries been accepted as a procedural guarantee, extending to accused persons all the safeguards of a fair and impartial trial. The American Constitution, Kelly & Harbison, p. 389. The Legislature could not have intended the result reached by the courts below. Were it otherwise, there is little doubt but that this Court would hold the provision unconstitutional. Should this Court do less where the application of the provision violates due process of law and reaches an impermissible result in the face of the Constitution?

CONCLUSION

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that, upon further consideration, writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit.

Joseph M. Glickstein, Jr.
Counsel for Petitioner

CERTIFICATE OF COUNSEL

I, JOSEPH M. GLICKSTEIN, JR., counsel for the above-named petitioner, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 58, subdivision 2, of the Rules of this Court.

Joseph M. Glickstein, Jr.
1205 Universal Marion Building
Jacksonville, Florida 32202
Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that five (5) copies hereof have been served upon Honorable Erwin N. Griswold, Solicitor General of the United States, Department of Justice, Washington, D. C. 20530, by United States Air Mail, postage prepaid, this 25th day of March, 1969.

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Counselor for Petitioner